78-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ORVILLE S. CLAVEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Orville S. Clavey, by his attorney, petitions for writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of the Panel of the United States Court of Appeals which initially heard this case is reported at 565 F.2d 111 (7th Cir. 1977) (App. A, *infra*,

pp. 1a-29a). The dissenting opinion of Judge Swygert is at App. A, p. 16a. The Petition for Rehearing *En Banc* was granted as to the issue of disclosure of grand jury testimony on February 28, 1978 (App. B, p. 30a). Upon rehearing en banc the case was affirmed by an evenly divided court. A separate opinion was filed by Judge Swygert, with a separate statement by Judge Pell. It is reproduced as App. C (pp. 31a-39a).

JURISDICTION

The judgment of the Court of Appeals on rehearing *en banc* (App. B, *infra*, p. 30a) was entered on June 23, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether or not a target defendant in a grand jury proceeding is entitled to a copy of his grand jury testimony so that he may secure the advice of counsel, as guaranteed by the Sixth Amendment, on the question of whether or not he should recant, as specifically allowed as a defense by the false declaration statute [18 U.S.C. § 1623(d)].

2. Whether or not the defendant was deprived of his right to the assistance of counsel when the trial court received written communications from the jury requesting instructions, indicating confusion, and requesting additional instructions, but refused all three requests without notifying counsel and without allowing

counsel for the defendant to be heard on the question of the Court's communications with the jury.

3. Whether or not the giving of an instruction on campaign funds being diverted so as to become income, which the Government admits was error, was reversible error; and, subordinate thereto, whether or not the Government practice of seeking an instruction for its own advantage and then claiming it not to be material is fair or not.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

Title 18, Section 1623, says, in relevant part:

> "(a) Whoever under oath . . . in any proceeding before . . . any grand jury of the United States knowingly makes any false material declaration, shall be fined not more than $10,000.00 or imprisoned not more than five (5) years, or both.
>
> * * * *
>
> "(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

STATEMENT

I.

Under Section (d) of Title 18, Section 1623, of the United States Code, a defense of recantation to a false declaration charge is created. The defense becomes viable if the defendant goes before the grand jury and admits the falsity or incorrectness of a statement which he has made while the same grand jury remains in session. Clavey, without counsel, made two lengthy appearances before the grand jury. Approximately five weeks after his second appearance, while the grand jury was still in session and five months before indictment, Clavey consulted counsel, who immediately, and by letter, requested a copy of Clavey's grand jury testimony so that he could advise Clavey on whether to recant pursuant to 18 U.S.C. § 1623(d) (App. C, p. 34a). Clavey could not recall his testimony sufficiently well to obtain advice.

This was before any grand jury testimony by the only witness which the jury believed in preference to Clavey—a private detective named March (App. C, p. 35a).

Clavey was unsuccessful at getting his grand jury testimony for the purpose of seeking the advice of counsel, and did not attempt to recant. After indictment, he moved to suppress his grand jury testimony; the motion was denied and, at the trial, the testimony, both as to the count as to which he was convicted and as to other counts on which he was acquitted, was a substantial portion of the evidence against him. The testimony upon which Clavey was convicted involved only $400.00, and was the smallest transaction involved in the case. All of the testimony was prejudicial.

The original panel affirmed, 2-to-1. Rehearing *en banc* was allowed, and the case was affirmed by an evenly divided court.

II.

The verdict in this case was split; Clavey was acquitted of extortion and of three counts of false swearing; on the same evidence, he was convicted of three counts of tax fraud and one count of false swearing.

The counts had a certain relationship each with the other; thus, the false swearing charges centered around Clavey's receipt of money, as did the extortion charge. The tax convictions would appear to be in conflict with the acquittals of false swearing, and it is plain that the jury did not have an easy time.

While the jury were deliberating, at 5 p.m. of the evening before the verdict, the foreman sent a note to the Court which said:

> "Is it possible to have copies of the instructions to the jury."

The answer was "no." The Defendant was not notified of the request, and his counsel had no opportunity to urge to the Court that the instructions be sent to the jury. [Defendant had previously asked that the jury have the instructions.]

After that, and apparently during the evening, the jury sent this note (using the same piece of paper)

> "Is it possible to have the judge explain a couple of points about the indictment and counts."

The Court reported his answer to counsel the next day, after the verdict, in these words:

> "And the answer to that was No, because I will not become the thirteenth juror in this case, and I should not invade the province of the jury, which I

did not do. The answer to the question to the jury, carried to them by the deputy United States marshall, was to 'continue to deliberate.' "

The jury was sequestered that night and the next morning sent another note to the Court:

"Judge Lynch: The counts in the indictment are related to one another, some more than others. For example, count 2 is related to count five. In this respect, if we find the defendant guilty on count two and or count three, must we also find him guilty on count one?

Spencer R. Sawyer, Foreman."

The Court's answer was that the jury should "continue to deliberate." Ten minutes later there was a verdict.

This point was determined adversely to Clavey by the original panel, with a dissent.

III.

Clavey was the Sheriff of Lake County, Illinois. As a politician, he had a campaign fund, and the campaign fund checkbook was received in evidence.

There was no claim by the Government in argument that Clavey had diverted any campaign funds to his own use.

At the conference on instructions, the government insisted on tendering an instruction which read as follows:

"If you find beyond a reasonable doubt that funds contributed to a political campaign were diverted to the defendant's personal use, then under the law these funds are income taxable to the defendant."

Precise written objection was made. The Court overruled the defendant's objection and gave the instruction, even though, as the Government conceded in the Court of Appeals, there was no evidence of campaign fund diversion.

The Court of Appeals, in a 2-to-1 decision, held this to be error, but that it was harmless (App. A, pp. 6a, 24a).

ARGUMENT

I.

A WITNESS SHOULD HAVE ACCESS TO HIS GRAND JURY TRANSCRIPT TO BE ABLE TO OBTAIN THE ADVICE OF COUNSEL.

In 1970, Congress enacted the False Declaration Statute. 18 U.S.C. § 1623. The purpose of this statute, among others, was to eliminate the two witness rule which had hindered various prosecutions for perjury.

But, in enacting this statute, and in providing an easier way to convict a person believed to have testified falsely, Congress provided a recantation defense [18 U.S.C. § 1623(d)] which had not been previously available under the Perjury Statute. 18 U.S.C. § 1621. See *U.S. v. Norris*, 300 U.S. 564.

The defense of recantation was designed to encourage witnesses to come back before the grand jury, after giving false or incorrect testimony, to correct that testimony, so that truth would be served. See 1970 U.S. Code Cong. & Adm. News, at p. 4007. It is a defense which can be created only by the affirmative act of a defendant who knows what he has said, and who determines that a recantation will be effective.

This defendant would be allowed, by Rule 6e, Federal Rules of Criminal Procedure, to relate his own testimony to his lawyer; but, he had been before the grand jury for two long sessions, and he had an imperfect memory.[1]

[1] Clavey was, during the pendency of the case, claimed by the Government to be incompetent to stand trial; on that claim, he was placed at Springfield, Missouri, for a period of time, in custody, for an examination, and was thereafter determined to be competent. Clavey opposed his hospitalization, and has always claimed that he was competent, even though determined to be incompetent at one point by the trial court.

Clavey's counsel, being unable to determine what Clavey had said to the grand jury with sufficient certainty to advise Clavey on the recantation defense, asked for the testimony by a letter which set forth that the purpose of the request was to be able to advise Clavey on whether or not to recant, and that the transcript would be accepted under any "restrictions . . . required to preserve the secrecy of the Grand Jury." (App. C, p. 34a).

The request was refused by the prosecutor. A formal petition to the Chief Judge of the District was denied, as was the motion to suppress at trial. The Government's position was that the Defendant did not have a particularized need for his testimony.

At the oral argument on the *en banc* rehearing the Government first raised the point that the perjury had "become manifest" by the time the request was made. In support of that point, the Government presented the grand jury testimony of private detective March, which contradicted Clavey on a $400 payment; it was read to the grand jury by March nine days *after* Clavey's request for his testimony (App. C, p. 34a) and on the same day as the refusal was formally made to Clavey's counsel.

The question, subsidiary to our point, is that the question of to whom perjury must be "manifest" to rule out recantation, was considered by the Court, and it was said by Judge Pell (App. C, p. 39a) that "manifest" clearly meant "manifest" to the witness.

We contend that it is appropriate for this Court to review the subject matter of the availability of grand jury testimony before indictment to a witness when that witness desires to seek legal advice concerning that testimony. The legal advice could be for purposes of recantation, as here, or for the purpose of determining whether or not the prosecutor has badgered the witness,

Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972), or so that the lawyer might advise the witness concerning matters of immunity. *In Re Russo*, 53 FRD 564 (C.D. Cal. 1971). There is no question but that a defendant may appropriately receive his grand jury testimony after indictment. F.R.Cr.P. 16(a)(1)(A). Rule 6e of the F.R.Cr.P. "imposes no bond of secrecy on a grand jury witness." (App. A, p. 17a).

A grand jury proceeding is a continuous process, and Clavey was the object of this grand jury; he had the right to counsel at every stage in that proceeding. The denial of counsel at any stage in a criminal proceeding is reversible error. *U.S. v. Tramunti*, 513 F.2d 1087, at 1105 (2nd Cir. 1975). His "defence" includes the right to advice as to the legitimate creation of a statutory defense under 18 U.S.C. 1623(d). See: Amendment VI, Constitution of the United States. "The plain wording of this guaranty thus encompasses counsel's assistance whenever necessary to ensure a meaningful 'defence.'" *U.S. v. Wade*, 388 U.S. 218 at 225.

The right to counsel at every stage of a proceeding has been repeatedly guaranteed by this Court. *Gideon v. Wainwright*, 372 U.S. 335; *Douglas v. California*, 372 U.S. 353; *Arsenault v. Massachusetts*, 393 U.S. 5. This right should surely apply to the critical stage at which only a review of the specific words[2] of the witness can tell whether or not a recantation would be well advised.

This question is surely the subject of a conflict within the Seventh Circuit. In other circuits, where the rule on the allowance of a transcript to a witness is more relaxed, the decisions conflict with the ruling here. See *In*

[2] *See Bronston v. U.S.*, 409 U.S. 352. Without the exact words, it would not be possible to tell whether or not recantation would even be necessary. One cannot rely on a generalized memory when it is the literal truth that is the test.

Re Craven, 13 Cr. Law. Rep., p. 2100 (S.D. Cal. 3/30/73). In the case of *In Re Russo*, 53 F.R.D. 564 (C.D. Cal. 1971) the judge ruled that an immunized witness who had testified once would be entitled to a copy of the transcript so that the witness might seek the advice of counsel and determine whether or not any corrections were required to avoid any criminal liability.

We submit that the traditional reasons for grand jury secrecy do not exist when it is the testimony of the witness himself that is sought; particularly when the witness is a target of a grand jury proceeding and seeks the testimony for the purpose of securing legal advice. (*Cf. U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 681, note 6.)

If the witness has the right to disclose his testimony under Rule 6e, F.R.Cr.P., then the witness should have the right to disclose it accurately to his lawyer so as to be advised. After as much as six hours before a grand jury it is doubtful that any person—however sane or intelligent—could accurately describe the questions and answers. People are often imprecise, without meaning to lie, and one's memory of a past conversation, even in a grand jury room, could well be both incomplete and inexact. And, prosecutors in the grand jury, unhindered by the discipline of a Judge and objections, do not always ask questions designed to draw out clear answers. See: *U.S. v. Slawik*, 548 F.2d 75 (3rd Cir. 1977).

We contend that Congress set up a statutory defense; to take advantage of that defense requires the advice of counsel, and the advice of counsel requires an accurate statement by the client of what has occurred. The only possible source of that accurate statement is the transcript. We submit that the Sixth Amendment guarantees the assistance of counsel on the matter of

this defense, and that such assistance cannot be effective without the transcript. We submit that this point is worthy of review because:

1. There is a conflict below, and a conflict between this ruling and opinions in the Ninth Circuit.
2. The question of access by a target defendant to his own grand jury testimony for the purpose of seeking legal advice should be answered by this Court, and
3. The right of this defendant to the effective assistance of counsel was plainly denied.

II.

THE COURT SHOULD DEAL WITH THE JURY IN OPEN COURT.

It is plainly wrong for a trial judge to speak directly to the jury out of the presence of counsel. In *U.S. v. U.S. Gypsum Co.*, 38 CCH S.Ct. Bull. B-4183, at p. B-4189, this Court reversed an anti-trust conviction in part because the trial judge engaged in direct conversation with the foreman of the jury, and did not reveal the full content of that conversation to counsel until after the verdict.

In this case the Judge refused the jurors the instructions, which they requested; did not tell counsel of that communication when received; refused a second request about "the indictment and counts" and finally refused a third request, which came shortly before the verdict, indicating that the jury was confused as to the inter-relationship between counts.

The defendant has the right to have the proceedings in the case happen in his presence, in the courtroom. Rule 43, F.R.Cr. P. He also has the right to have his attorney heard on all questions before the court. U.S. Constitution, Amendment VI; *Shields v. U.S.*, 273 U.S. 583: *Fillipon v. Albion Vein Slate Co.*, 250 U.S. 76. It is wrong for the judge to instruct the jury through the marshal, *Wheaton v. U.S.*, 133 F.2d 522 (8th Cir. 1943), as was done here.

And, when the jury is in difficulty with a case, it is the duty of the trial judge to assist them. *Bollenbach v. U.S.*, 326 U.S. 607.

The last thing this jury heard from the Judge was his refusal to assist them in resolving an inconsistency which survived to the verdict. "[T]he Judge's last word is apt to be the decisive word." *Bollenbach, supra*, 326 U.S. at 612.

Even on the question of the instructions, although it was the custom of the district judge not to send out the instructions with the jury, the request by the jury for the instructions invoked the court's discretion; after that invocation of discretion, the judge should have heard counsel. See *Oertle v. U.S.*, 370 F.2d 719 (10th Cir. 1966); *Outlaw v. U.S.*, 81 F.2d 805 (5th Cir. 1963). If the Judge has discretion on a point, he should hear counsel on the exercise of that discretion. Amendment VI to the Constitution of the United States so requires.

We submit that the right to counsel is the right to be heard on every question that comes up in a trial. And the right to be present is the right to be there when the Judge communicates with the jury. The reasoning by which the defendant is somehow required to demonstrate prejudice is based on the Court's reading of the minds of the jurors in construing the meaning of their message (App. A, p. 14a). Conceding error, the majority of the panel denied reversal because of what it thought the jury's message meant; but in interpreting the message, the panel majority misunderstood the message (App. A, pp. 13a, 15a).

The decision below should be considered because:

1. It is important to the administration of justice that Judges allow lawyers to be heard on the subject matter of communications with the jury.
2. It is important that defendants on trial be allowed to be present at all times when the jury is instructed or refused instruction.
3. The decision below is in plain conflict with the most recent decision of this Court in the *U.S. Gypsum* case.

III.

THE JURY WAS INSTRUCTED ON MATTERS AS TO WHICH THERE WAS NO EVIDENCE.

The jury was instructed, at the insistence of the Government, on the diversion of campaign funds. Specific objection was made that there was no evidence of such a diversion. Then, on appeal, and after a split verdict which can be explained by giving some effect to the "campaign contribution" instruction, the Government, and the majority of the Court of Appeals say that the instruction was harmless because there was no evidence to support it.

It thus appears that an instruction on any point may be given at the request of the Government; if it is related to the record, then it is properly given, and if not supported by the record, it is harmless.

This is wrong in law, and plainly contradicts one of the oldest holdings of this Court. *U.S. v. Breitling*, 61 U.S. (20 How.) 252, quoted in Judge Swygert's dissent at App. A, p. 25a. The opinion below conflicts with the *Breitling* opinion, and with *Morris v. U.S.*, 326 F.2d 192 (9th Cir. 1963), and *U.S. v. Linn*, 438 F.2d 456 (10th Cir. 1971). The Seventh Circuit has previously held that an instruction on a point as to which there was no evidence

is not reversible if no objection is made, *U.S. v. Demopoulis*, 506 F.2d 1171 (7th Cir. 1974), and now holds that such an instruction is not error even when an appropriate and timely objection is made.

The particular harm in this case was that Clavey, a politician, did receive contributions to his campaign fund. And, the jury had access to the evidence of that fund, and, although the Government did not claim any diversion, the fund was there, and it was not explained to them how it could be relevant except for purposes of conviction. Clavey was acquitted on false declaration charges as to every financial transaction in the case except the March transaction, and was convicted for two years of tax filings that did not involve March. The only way to reconcile the inconsistent verdicts is to presume some efficacy to this instruction, and that would indicate clear prejudice. And, the best proof of prejudice is that the Government proposed it, presented it and opposed the objection to it. Only on appeal, when it appeared, on reflection, to be error did the Government retreat to the "no evidence" point.

We submit that the decision below—allowing the giving of a plainly erroneous instruction over specific objection—contradicts good practice and conflicts with decisions of this Court and of other circuits. Such a conflict should be resolved. The dissent of Judge Swygert states our case for such review far better than this brief, and we ask that it be considered in support of our petition. (App. A, at pp. 24a, 25a).

CONCLUSION

The writ of certiorari should, we submit, be granted.

Respectfully submitted,

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APPENDIX A

(Opinion of October 31, 1977)

United States Court of Appeals
For the Seventh Circuit

No. 76-1926

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ORVILLE S. CLAVEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 75 CR 223—**William J. Lynch**, *Judge*, and **Bernard M. Decker**, *Judge*.

ARGUED APRIL 8, 1977—DECIDED OCTOBER 31, 1977

Before SWYGERT, WOOD, and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Clavey was charged in an eight-count indictment specifying four counts of false swearing before a grand jury, three counts of failure to report income on his tax returns, and one count of conspiracy to extort funds from a liquor license holder. The Government established at trial that, while serving as Sheriff of Lake County, Illinois, Clavey received unreported income from several county residents in a series of transactions effected through his chief deputy, Jerome P. Schuetz, who testified against Clavey under a grant of immunity from prosecution. The jury ultimately acquitted Clavey of three of the false swearing counts and

the extortion count, and convicted him of one count of false swearing and the three tax counts. He seeks reversal of his convictions on several grounds, the most significant of which are that the district court committed reversible error (1) by refusing to release a transcript of his grand jury testimony, (2) by refusing to admit evidence Clavey offered to rebut the testimony of a government witness, (3) by erroneously instructing the jury, and (4) by not responding to the jury's request for supplementary instructions during its deliberations and failing to advise counsel of the jury's inquiries to the court. We affirm his conviction for the reasons noted below.

I.

Clavey first contends that he was deprived of the effective assistance of counsel during the grand jury proceedings which led to his indictment.

Clavey appeared before the grand jury on two occasions without counsel. He retained counsel about five weeks after his second appearance. At that time, his counsel filed two unverified petitions with the district court for the release of a transcript of Clavey's grand jury testimony so that he could advise Clavey whether or not to recant aspects of his prior testimony pursuant to the right established in 18 U.S.C. § 1623(d), which provides:

> "(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

In the petitions, Clavey alleged that he could not recall the substance or detail of his testimony because of an illness and a skull fracture that adversely affected his memory.

Chief Judge Robson of the District Court for the Northern District of Illinois denied both petitions on the ground that Clavey had failed "to demonstrate with particularity a 'compelling necessity' for disclosure." Approximately four months later the same grand jury returned the indictment in this case.

After the indictment was returned, Clavey moved to suppress it on the ground that he was denied the effective assistance of counsel in asserting his right to recant under 18 U.S.C. § 1623(d) by Judge Robson's refusal to release a transcript of Clavey's grand jury testimony to his counsel. Judge Lynch[1] denied the motion, and Clavey reasserts the claim here.

Federal Rule of Criminal Procedure 6(e) permits district courts to order the disclosure of grand jury testimony to persons other than attorneys for the Government "preliminarily to or in connection with a judicial proceeding."

We recently reviewed the standards to be applied by district courts in deciding whether to disclose grand jury testimony upon request:

> "The Supreme Court has declared that the secrecy protected by Rule 6(e) 'must not be broken except where there is a compelling necessity,' which 'must be shown with particularity.' *United States v. Proctor & Gamble Co.*, [356 U.S. 677, 682]; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400. . . . [T]here still exists . . . in . . . cases in which disclosure is not provided for as a matter of right in 18 U.S.C. § 3500(e)(3) and Rule 16(a)(1)(A), Fed. R. Crim. P., a requirement that the party seeking disclosure show a need commensurate with the degree of secrecy remaining and the policy reason that justifies that secrecy." *Illinois v. Sarbaugh*, 552 F.2d 768, 774 (7th Cir. 1977).

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[1] The Hon. William J. Lynch presided over the trial in this matter, but died before sentencing. Judge Decker imposed sentence.

Inasmuch as Clavey was not entitled to a transcript of his testimony as a matter of right, the analysis set forth in *Sarbaugh* is applicable here. In the circumstances of this case, we agree with Judge Robson that Clavey did not establish a sufficiently "compelling" need for disclosure that outweighed the need to preserve grand jury secrecy.

We find significant, as did the district court, that Clavey refused to verify his petition as the district court requested. Though the purpose for which Clavey sought the transcript is no doubt a proper one, in that the transcript was sought in aid of his right to recant his prior testimony, we believe the district court was appropriately skeptical of Clavey's unverified claim that he was unable to recall his prior testimony because of a poor memory attributable to physical impairments. Absent verification of Clavey's ailments, there was no reason for the district court to assume that a transcript was essential to facilitate effective attorney-client deliberations concerning the possibility of Clavey's recanting his prior testimony. Cf. *United States v. Cowsen*, 530 F.2d 734, 736 (7th Cir.), *cert. denied*, 426 U.S. 706 (1976). Moreover, we note that, even without a transcript, Clavey could have obtained any information concerning his prior testimony needed by his attorney by reappearing before the grand jury and requesting a review of his testimony. During such an appearance Clavey could have communicated with counsel at any time outside the grand jury room.

The policy reasons justifying strict preservation of the secrecy of ongoing grand jury proceedings are compelling and should not be lightly discounted simply because a witness asserts an unverified need for a transcript of his prior testimony.[2] In view of Clavey's failure to verify

[2] In *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958), Supreme Court summarized the historical justifications for preserving grand jury secrecy:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons

(Footnote continued on following page)

with particularity a compelling necessity for a transcript of his prior testimony, we do not believe the district court denied him the effective assistance of counsel by refusing to release a transcript to him. See *Bast v. United States*, 542 F.2d 893 (4th Cir. 1976); *United States v. DeSalvo*, 251 F. Supp. 740, 746 (S.D.N.Y. 1966).

II.

Clavey's next argument is that the district court erred in refusing to admit evidence offered to rebut the testimony of Gene March, a government witness, that March had bribed Clavey with a $400 check to obtain a $1000 lie detector contract with the sheriff's office. Clavey contended that March's check, which Clavey had cashed, constituted repayment of a loan. March testified that he wrote "RT loan" on the face of the check, but only at Clavey's request. To impeach March's testimony that the check was a bribe rather than a loan repayment, Clavey's counsel sought to admit evidence during his cross-examination of March and again during his case-in-chief that March had sought and obtained a personal loan from a Frederick Hedblum at approximately the same time he paid Clavey the $400. The trial judge refused to admit the evidence, and Clavey contends on appeal that his refusal constituted reversible error.

We agree with Clavey that evidence of March's financial condition was relevant to the issue of whether Clavey had loaned him funds in the limited sense that it tended to make Clavey's theory slightly "more provable . . . than it would [have been] without the evidence." Fed. R. Evid. 401. However, relevant evidence may be excluded

[2] *continued*

> subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at trials of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated. . . ."

> "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The evidence here of a transaction in which the defendant did not partake was of limited probative value, and we cannot say that the trial judge abused his broad discretion under Rule 403 in determining that the evidence would have tended to confuse the issues and unduly consume time. *United States v. Robinson*, 503 F.2d 208, 216 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975).

III.

Clavey challenges the court's charge to the jury in several respects.

A. *Campaign Contribution Instruction*

Clavey first argues that the court erred in allowing the jury to consider whether he diverted campaign funds to his own use when there was no evidence to support such a charge.

On the first day of the trial the bank account records of Clavey's campaign fund were admitted into evidence without objection. As the trial proceeded, however, neither side made use of the records or included them in their respective theories of prosecution or defense. Nevertheless, over Clavey's objection, the court instructed the jury:

> "If you find beyond a reasonable doubt that funds contributed to a political campaign were diverted to the defendant's personal use, then under the law these funds are income taxable to the defendant."[3]

Clavey contends that the court committed reversible error in giving the campaign fund instruction because it

[3] The instruction properly states the law. *United States v. Miriani*, 422 F.2d 151, 152 (6th Cir.), *cert. denied*, 399 U.S. 910 (1970).

provided the jury with a basis for convicting Clavey not rooted in the evidence. The Government concedes that the instruction was not supported by the evidence at trial, but argues that its inclusion in the charge was harmless error.

We agree with the Government that the instruction was harmless because, in the circumstances of this case, the jury could not have been misled by it. By its own terms, the instruction required the jury to find beyond a reasonable doubt that campaign funds were diverted to Clavey's personal use before arriving at the conclusion that such funds constituted income taxable to Clavey. Because there was no evidence that any campaign funds were ever diverted to Clavey's personal use, the jury could not have convicted Clavey on the basis of the campaign fund instruction. See *United States v. Demopoulos*, 506 F.2d 1171, 1180 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *Long v. United States*, 360 F.2d 829, 835 (D.C. Cir. 1966).

B. *"Material Matter" Instruction*

Clavey was convicted of violating 26 U.S.C. § 7206(1), which states that any person who

> "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5000 or imprisoned not more than 3 years, or both, together with the costs of prosecution."

In instructing the jury on the meaning of "material matter" in Section 7206(1), the district court stated:

> "Under the law the term 'material matter' refers to any item which would tend to influence the Internal Revenue Service in its normal tax collection and processing procedures. It is not necessary that the government prove that the defendant omitted any specified amount or total amount in Counts 5, 6 or

> 7. All that is necessary is that the government prove that the return was false as to a material matter."

Clavey argues on appeal that, in view of the absence of evidence as to IRS standards of materiality, this instruction was erroneous because it left the jury free to speculate as to the meaning of "material matter."

We agree with Clavey that, absent evidence of IRS materiality standards, this instruction was of little assistance to the jury in determining what constituted material matter. However, Clavey could not have been prejudiced by the giving of the instruction because the only false statements the Government charged that Clavey had made on his income tax return, those statements reporting his gross income, were clearly material matters for purposes of 26 U.S.C. § 7206(1). See *United States v. DiVarco*, 343 F. Supp. 101, 102 (N.D. Ill. 1972), and cases cited therein.

C. *Motive Instruction*

Clavey next argues that the court erred in giving the following instruction:

> "Motive is what prompts a person to act or fail to act. If you find beyond a reasonable doubt that the defendant knowingly and wilfully accepted any of the payments about which evidence was presented you may, if you choose to do so, consider the circumstances surrounding the payments and the purposes for which they were made as providing a motive for the commission of the crimes charged in Counts 1, 2, 3, 5, 6, 7, and 8 of the indictment.

He claims that the instruction he tendered should have been given instead. His instruction, taken from Devitt & Blackmar, 1 *Federal Jury Practice and Instructions* § 13.05 (2d ed. 1970), is identical to the instruction given by the court except for the addition of two sentences: At the beginning, Clavey's instruction adds, "Intent and motive should never be confused"; at the end it adds, "The motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of

mind or intent." Clavey argues that the omission of these phrases in the court's instruction confused the jury as to the effect they should give motive and made it possible for the jury to substitute proof of motive for proof of the intent element of the crimes charged.

We agree with Clavey that, if the court chooses to give a motive instruction at all, the standard instruction tendered by Clavey is preferable to the one given here because it more clearly explains the proper role of motive in the case. Nevertheless, in view of the other comprehensive instructions on the mens rea of the crime charged given by the court, the motive instruction could have been interpreted only as suggesting another factor to be considered by the jury—the instruction's proper function—rather than as providing a substitute means for proving the mens rea of the charged crimes. The court instructed the jurors that they had to find beyond a reasonable doubt that Clavey had the requisite specific intent for the crimes charged, viz., that he "knowingly did an act which the law forbids, purposely intending to violate the law" (Tr. 1421). The court went on to painstakingly instruct the jury on the meaning of "knowingly" and "wilfully," and set out all of the elements, including the mens rea, of each of the counts charged. We believe that the jury was properly instructed as to intent, and that the jury was not invited to confuse intent with motive.

D. *Character Instruction*

Clavey next claims that the court erred by not giving his tendered character evidence instruction. The Government responds that Clavey did not properly object to the failure of the trial court to given such an instruction, and that Clavey thus is precluded by Rule 30 of the

Federal Rules of Criminal Procedure[4] from asserting his claim.[5]

Prior to the end of the defense's case, both sides submitted numbered instructions. Later, near the end of the trial, Judge Lynch told counsel:

> "Tomorrow we will proceed with what we have left and what you might have to present, and we know definitely we will go into the question of instructions. They don't take too long, most of them, a great majority of them, they will be specials, I know, and I had anticipated some of them, and they are stock."

Clavey's counsel then stated:

> "I had not included the character evidence on the charge yet, and I will bring that over."

Judge Lynch replied, "You mean on the instructions? Include it." The next day Clavey's counsel filed detailed objections to the Government's proposed instructions and attached several unnumbered instructions of his own, including a character evidence instruction. That afternoon, an instruction conference was held. Prior to the conference, defense counsel asked the court to consider his written objections as part of the record even if he did not reiterate them orally. At no time during the conference did he point out his recently tendered character evidence instruction.

[4] Rule 30 of the Federal Rules of Criminal Procedure provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

[5] The Government, pointing out that both sides presented evidence as to Clavey's reputation, does not challenge Clavey's contention that such an instruction should have been given.

After Judge Lynch instructed the jury, defense counsel objected to specific instructions that were given and then engaged in the following colloquy with the judge:

> "Mr. Collins: The other thing, Judge, is I ask you again to consider all the objections in my written objections in the tendered instructions, which we tendered, which your honor has not given, and please, your Honor, give me a ruling.
> The Court: I will. I have given them consideration and judgment is that they are overruled.
> Mr. Collins: In the instructions we tendered, there were—.
> The Court: They were refused.
> Mr. Collins: Thank you very much, Judge.
> The Court: I think I have marked them refused.
> Mr. Collins: I believe so, Judge."

At no point did defense counsel indicate to the court that his character evidence instruction had not been given and had not been marked refused.

While defense counsel did tender a character evidence instruction, we hold that he waived his right to object on appeal to the court's failure to give the instruction because he did not sufficiently bring the instruction to the court's attention. Rule 30 requires parties wishing to object to "any portion of the charge or *omission therefrom*" to "stat[e] distinctly the matter to which he objects and the grounds of his objection." Fed. R. Crim. Proc. 30 (emphasis added). Counsel's passing mention at the end of a day's testimony of his intention to tender the instruction and his attachment of the instruction to a list of objections was not sufficient in our opinion to meet Rule 30 standards. See *United States v. Wright*, 542 F.2d 975, 983-85 (7th Cir. 1976), *cert. denied*, 429 U.S. 1073

(1977). The defense was given an opportunity to distinctly object on the record to the omission of the instruction both at the instruction conference prior to the reading of the instructions and at the post-instruction conference. Counsel failed to mention the omission of the character evidence instruction during either conference. See generally, *United States v. Hollinger*, No. 76-1223, slip op. at 5-12 (7th Cir. Apr. 22, 1977).

IV.

Finally, Clavey argues that the court erred by not informing counsel of inquiries from the deliberating jury and by not responding to them.

While the jury was deliberating, the foreman sent a note to the court at 5 p.m. on the evening before the verdict was reached. The note read:

> "Is it possible to have copies of the instructions [sent] to the jury?"

The answer was, "No." The defendant was not notified of the request, and his counsel had no opportunity to urge the court that the instructions be sent to the jury.[6]

Later, apparently during the evening, the jury sent the following note to the court on the same piece of paper:

> "Is it possible to have the judge explain a couple of points about the indictment and counts?"

The judge reported to counsel the next day that

> "the answer to that [inquiry] was No, because I will not become the thirteenth juror in this case, and I should not invade the province of the jury, which I did not do. The answer to the question to the jury, carried to them by the deputy United States Marshal, was to 'continue to deliberate.'"

The jury spent the night at a hotel, and the next morning sent another note to the court:

[6] Defense counsel had previously requested that copies of the instructions be given to the jury.

> "Judge Lynch: The counts in the indictment are related to one another, some more than others. For example, count 2 is related to count five. In this respect, if we find the defendant guilty on count two and on count three, must we also find him guilty on count one? Spencer R. Sawyer, Foreman."

The court replied that the jury should "continue to deliberate." Ten minutes later the jury reached a verdict.

We think Clavey's contentions that the court should have advised counsel of the jury's inquiries and made an effort to respond to them have merit. Federal Rule of Criminal Procedure 43 guarantees a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." This guarantee includes the right to be present when communications are made to a deliberating jury. *Rogers v. United States*, 422 U.S. 35 (1975); *Shields v. United States*, 273 U.S. 583 (1927); *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919). As the Supreme Court said in *Rogers*,

> "Cases interpreting the Rule make it clear . . . that the jury's message should [be] answered in open court and that [defense] counsel should [be] given an opportunity to be heard before the trial judge respond[s]." 422 U.S. at 39.

Moreover, the Supreme Court has held that

> "[d]ischarge of the jury's responsibility . . . depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946).

The jury's final two questions, particularly the last one, indicate that the jury was encountering difficulty with the instructions in this relatively complex case. The trial judge's perfunctory answers were clearly inadequate

responses to the jury's inquiries. See *United States v. Harris*, 388 F.2d 373, 377 (7th Cir. 1967); *United States v. Bolden*, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975). At a minimum, the judge should have reread whatever portions of the original instructions given to the jury that the jury requested or that related to its inquiry. See *United States v. Papia*, No. 76-1420, slip op. at 23-25 (7th Cir. Aug. 19, 1977).

While we agree that the court erred in not informing counsel of the jury's inquiries and in not making a reasonable effort to clear up the jury's difficulties, we must still determine whether the court's errors were harmless. See *United States v. Dellinger*, 472 F.2d 340, 378-79 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Ware v. United States*, 376 F.2d 717 (7th Cir. 1967).

In view of the particular questions asked by the jury, we hold that the court's errors were indeed harmless. As to the jury's request for written instructions, we are convinced that the judge's failure to inform the parties of the request or to grant it could not have affected the jury's verdict. Cf. *United States v. Hoffa*, 367 F.2d 698, 712-13 (7th Cir. 1966), *vacated on other grounds*, 394 U.S. 310 (1967). The submission of written instructions to the jury is a matter within the trial court's discretion. E.g., *United States v. Davis*, 437 F.2d 928, 929 n.1 (7th Cir. 1971); *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963).

The latter two questions appear to be interrelated. In the second question, asked during the evening, the jury requested an explanation of "a couple of points about the indictment and counts." The following morning the jury asked for specific information concerning the relationship between certain counts in the indictment. Read together, the latter question appears to be simply a specific version of the former. At a minimum, it reflects that aspects of the uncertainty that generated the second question still concerned the jury.

Because Clavey was acquitted of counts one and two, however, we can infer that the jury resolved the third question—whether Clavey had to be found guilty on

counts one and two if he was found guilty on the related counts five and three—in favor of the defendant. In view of this resolution, Clavey could not have been harmed by the judge's failure to answer the jury's question, for the judge's answer could not have produced a more favorable result for him. Moreover, because the difficulty that engendered the jury's second question was reflected in the third question, resolved in the defendant's favor, we are convinced that the judge's failure to respond to that question is harmless error as well.

V.

We have carefully considered the other points raised by Clavey and find them also to be without merit.

AFFIRMED.

SWYGERT, *Circuit Judge*, dissenting. I respectfully dissent upon several grounds. They include the refusal to give the defendant a copy of his own grand jury testimony, the giving of erroneous jury instructions, and the trial judge's failure to inform counsel of the jury communications and to respond to their questions.

I

The majority holds that the defendant was not entitled to a transcript of his own grand jury testimony because he failed to demonstrate with particularity a compelling necessity for disclosure. This conclusion, I submit, is erroneous for two reasons. First, the district court should not have applied the "particularized need" standard when confronted with a request by a grand jury witness for a copy of his own testimony. I believe that a witness has a *prima facie* right to a copy of his own testimony in all cases unless the Government can show special overriding reasons for nondisclosure. Second, even using this "particularized need" test, the district court still erred in finding no showing of a particularized need in the circumstances presented in this case.

A

The majority, citing our recent decision in *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1977), holds that a witness is not entitled to his grand jury testimony as a matter of right and that therefore the particularized need standard must be employed. I believe the majority was too quick in its decision, for both reason and equity dictate that there is no justification for imposing secrecy in this instance. Disclosure to a witness of his own testimony will neither limit the effectiveness of the grand jury nor place the protection of witnesses in jeopardy.

The particularized need standard was formulated to deal with a request for the grand jury testimony of another witness. Under this standard, the need for the testimony is weighed against the need for maintaining

grand jury secrecy and the need to free witnesses from testifying under apprehension that their testimony may be disclosed.[1] All of the cases in which the Supreme Court has applied the particularized need standard have involved witnesses seeking access to the testimony of other witnesses before the grand jury, *see Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *see also Sarbaugh, supra*, and not a witness seeking a copy of his own testimony. To avoid blindly extending the particularized need standard and preserving secrecy for secrecy's sake, we must carefully consider whether that standard should be applied in this context.

Rule 6(e) of the Federal Rules of Criminal Procedure imposes no bond of secrecy on a grand jury witness; he is free to disclose all that transpired while he was present. Rule 6(e) purposely excludes witnesses from the general nondisclosure requirement[2] because "[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Original Advisory Committee Notes to Rule 6(e). Thus, a witness is already allowed to disclose the very information which the defendant here attempted to obtain.

A review of the reasons traditionally advanced for justifying the veil of secrecy upon grand juries shows that none dictates that a witness should be denied a copy of his own testimony.[3] Furnishing a witness with a

[1] Professor Wigmore states that the nondisclosure of a witness' testimony is a privilege of the witness himself, not of the grand jury panel or of the Government. 8 J. Wigmore, EVIDENCE § 2362, at 736 (McNaughton rev. 1961).

[2] FED.R.CRIM.P. 6(e) does, however, impose secrecy upon jurors, attorneys, interpreters, stenographers, operators of recording devices, and typists.

[3] The following five justifications for grand jury secrecy are generally recognized by courts:

(1) To prevent the escape of those whose indictments may be contemplated; (2) to insure the utmost freedom to the

(Footnote continued on following page)

written transcript of his testimony could no more interfere with the functions of the grand jury than the existing practice of leaving the witness free to disclose

[3] *continued*
grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury to tampering with the witnesses who may testify before the grand jury and later appear at the trials of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958), *quoting United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954).

The second and fourth justifications for secrecy are clearly inapplicable to a witness who seeks his own testimony. Permitting a witness to disclose his testimony does not interfere with the jurors' ability to deliberate and vote in secrecy. Neither will disclosure serve to interfere with a witness' full disclosure before the grand jury. Release to a witness of his own testimony does not cause that witness any apprehension that his testimony will be disclosed if he does not want it disclosed; if anything, the assurance that a witness will receive a copy of his statement might function as a catalyst to his testimony. *In re Minhoff*, 349 F. Supp. 154, 157 (D.R.I. 1972).

Nor do the other reasons apply with any force. The first and third reasons—to prevent escape and the subornation of perjury—are not valid since the witness is already free to disclose all he knows. If a witness chooses to aid the guilty accused, a transcript will not help him more than the freedom he already possesses.

The last justification—to protect the innocent accused who is not indicted—deserves special scrutiny. Again, the witness' freedom to disclosure his own testimony makes production of a written copy no more damaging to the grand jury's secrecy. Further, the thirty year history of Rule 6(e) and the absence of criticism of that rule indicates that the innocent accused will not suffer if a transcript is made available to witnesses. *See In re Russo*, 53 F.R.D. 564, 571 (C.D. Calif. 1971).

In short, I find no meaningful difference between granting a witness the freedom to disclose under Rule 6(e) and giving him a copy of his testimony.

orally his testimony to others.[4] The "evil," if any, is in the witness' freedom to disclose, not in furnishing him a transcript. As Judge Wyzanski aptly stated in this regard:

> The horse is out of the stable, and all that we are considering is whether to lock the barn door so that the horse may not carry its master's correct colors. *Bast v. United States*, 542 F.2d 893, 898-99 (4th Cir. 1976) (dissenting opinion).

Because there are no valid considerations which militate in favor of grand jury secrecy in this case, and because numerous benefits to the witness will inure from disclosure,[5] justice requires that a witness be given access to his own testimony unless the Government affirmatively establishes a substantial reason why it should be withheld.

[4] *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282 (S.D. Fla. 1972), in denying disclosure to a witness, held that one reason for nondisclosure was to protect the witness from his own poor judgment. That court stated that a witness is not always in the best position to determine whether to obtain a transcript since "a witness may not realize the significance of his testimony at the time he seeks disclosure." *Id.* at 1285. The court stated that a witness who obtained disclosure could fall prey to intimidation by those persons being investigated. Such a witness, the court urged, will find it more difficult to deny having given useful testimony.

I find such an argument to be speculative at best and paternalistic at worst. The validity of a rule protecting a person not wanting protection is nonsensical. It may be in the witness' interest to have a copy of his testimony so that he may assure his associates that he did not violate their trust when he testified about their activities. In any event, the need for witness' protection can best be evaluated by those who know their interests the best—the witnesses themselves.

[5] Requiring that a transcript be accessible to a witness has numerous benefits for the witness. A written transcript will insure that the witness' attorney is provided with an accurate record of the proceedings. It gives the witness and his attorney an opportunity to correct errors in the transcript or inadvertent mistakes in the testimony itself, or, as in the present case, to exercise his right to recant his testimony under 18 U.S.C. § 1623(d).

(Footnote continued on following page)

This conclusion is buttressed by Rule 16(a)(1)(A) which states that a defendant is entitled as a matter of right to a copy of his own testimony before the grand jury. As the Third Circuit stated in *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1954), before the amendment to Rule 16 which makes disclosure mandatory:

> Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings. (emphasis in original)

If a defendant's access to his own testimony does not violate the sanctity of grand jury secrecy, it follows *a fortiori* that a witness seeking his own testimony does not do so. To hold otherwise would be to "exalt the principle of secrecy for secrecy's sake." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407 (1959) (Brennan, J., dissenting).

The reasons underlying grand jury secrecy are compelling. This secrecy, however, cannot be used as a talisman to ward off further inquiry whether it serves a legitimate function under certain circumstances. As Mr. Justice Brennan again observed:

> Grand Jury secrecy is, of course, not an end in itself. Grand Jury secrecy is maintained to serve particular ends. But when secrecy will not serve

[5] *continued*

Other benefits inure from disclosure. A written transcript would minimize the possibility of a witness publicizing false information regarding grand jury proceedings. It can also be used to illuminate prosecutorial excesses such as witness badgering or improper scope of investigation. *See Bursey v. United States*, 466 F.2d 1059, 1079-80 (9th Cir. 1972). Further, a transcript gives an immunized witness who testifies to crimes for which he is later indicted a check against tainted evidence; it assures him that his testimony or the fruits thereof will not be used against him under the guise of information obtained from other, independent sources. *See In re Minhoff*, 349 F. Supp. 154, 157 (D.R.I. 1972).

> those ends . . . secrecy may and should be lifted. *Pittsburgh Plate Glass Co., supra* at 403.

As secrecy would serve no purpose in this case, disclosure should have been permitted.

B

Though I believe a discussion whether the defendant demonstrated a particularized need is irrelevant, I am constrained to address this issue because I believe the majority misinterpreted and misapplied that standard.

When the particularized need standard is used, the party seeking disclosure must show a need commensurate with the reasons justifying secrecy. *Illinois v. Sarbaugh*, 552 F.2d 768, 774 (7th Cir. 1977). Because the level of need diminishes as the reasons for secrecy become less compelling, *id.*, we must first identify those justifications of secrecy which would be undermined by disclosure before we can determine whether the alleged need for disclosure outweighs the policy of secrecy.

Although the majority pays homage to the historic sanctity of grand jury secrecy, it makes no showing how the denial of the defendant's grand jury testimony serves any of the purposes justifying secrecy. As noted earlier, I believe that no reason justifying grand jury secrecy applies when a witness seeks a copy of his own testimony.

The question, then, is whether, given the absence of reasons justifying secrecy here, the defendant has shown a sufficient level of particularized need to warrant disclosure. In this case, the defendant alleged that he could not recall the substance of his two grand jury appearances because of an illness and a skull fracture that adversely affected his memory. Because he could not remember the substance of his testimony, the defendant claimed that he needed a transcript so that he could seek legal advice as to whether to exercise his right to recant under 18 U.S.C § 1623(d). Both of the defendant's requests were denied, the district court holding that defendant failed "to demonstrate with particularity a 'compelling necessity' for disclosure." The

defendant was subsequently indicted and convicted on a count of false swearing.[6]

The majority finds it "significant, as did the district court," that the defendant did not verify his affidavits. I read the record of this case quite differently. The defendant's second petition was denied not because it was unverified, but because the district judge thought that the defendant had failed to show a particularized need.[7] Nor does the record establish that defendant's first petition was denied because it was not verified. The record shows that the court requested the defendant to file a "full and complete petition," and not one which was verified. The issue, then, is limited to determining whether the district court was correct when it held that the defendant failed to show a particularized need. I believe that it was not and that the facts of this case make out a need as compelling as any possible.

I believe that this case is controlled by *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954). *See also United States v. Remington*, 191 F.2d 246 (1951), *cert. denied*, 343 U.S. 907 (1952). In *Rose* the defendant was convicted of perjuring himself before the grand jury under 18 U.S.C. § 1621. Before trial, he moved to inspect the grand jury testimony, stating that he was suffering from diabetes and a heart ailment at the time he testified before the grand jury. As a result, he suffered lapses of memory which impaired his attorney's ability to prepare and conduct his defense effectively. The court, quoting *Remington, supra*, with approval, stated:

[6] After indictment the defendant did see his testimony. But, by then, the statutory defense of recantation was gone.

[7] Judge Robson's Memorandum and Order entered on December 23, 1974 stated:

> Accordingly, Clavey's petition for production of his grand jury transcripts must be denied for failing to demonstrate with particularity a "compelling necessity" for disclosure. Since this conclusion is dispositive of the matter, the court need not reach the remaining issues raised by the Government.

The only time in which Judge Robson even mentioned that the second petition was not verified was in the beginning of the second paragraph of his order when he stated, "In two unverified petitions . . . ."

> We think inspection before trial should have been allowed. As already stated, the essential issue in perjury is whether the accused's oath truly spoke his belief; all else is contributory to that issue . . . . His memory of what he said is no adequate substitute for the minutes themselves. It is one thing to deny defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his testimony which may afford him an affirmative defense. 215 F.2d at 629.

Noting that disclosure would subvert none of the policies justifying secrecy, the court held nondisclosure to be reversible error.[8]

As in *Rose*, the defendant here was charged and convicted of perjuring himself before the grand jury. As in *Rose*, the defendant's lapse of memory impaired his ability to obtain and to use the assistance of counsel. And finally, as in *Rose*, the refusal to provide a transcript denied affording the defendant an affirmative defense to the charges of false swearing.

The need for disclosure here is strengthened by the recent enactment of the recantation statute, 18 U.S.C. § 1623(d). The specific congressional purpose in enacting this legislation was to induce witnesses to give truthful testimony by permitting them to correct false statements without incurring the risk of prosecution for doing so. *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir. 1976); *United States v. Del Toro*, 513 F.2d 656, 665 (2d Cir. 1975); *United States v. Lardieri*, 506 F.2d 319,

[8] In its brief, the Government cites two cases, *United States v. DiSalvo*, 251 F. Supp. 740 (S.D.N.Y. 1966), and *United States v. Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1962), in support of its arguments. These cases are factually distinguishable in that they involved prosecutions for crimes other than perjury. More important, the defendants in those cases sought their transcripts in order to "refresh" their memories; they were not needed to raise an affirmative defense as in *Rose* and *Remington*, and they were not necessary to assist counsel to decide whether to recant as in this case.

322 (3d Cir. 1974). *See* 1970 U.S. Code Cong. & Adm. News at 4007. This congressional purpose is frustrated if witnesses are not able to obtain the assistance of counsel in determining whether to exercise this privilege.

The majority, seeking to minimize the import of its decision, states that the defendant could have reappeared before the grand jury and reviewed his prior testimony. Besides the practical difficulties involved when a witness frequently leaves the grand jury room to communicate with his attorney, this alternative provides no remedy. Without knowing what his client has said, defense counsel is in no position to give legal advice or even determine whether there was anything to recant.

The criminal justice system is not a game of hide and seek. Specifically, the Government should not hide grand jury testimony from the person who gives it. Mr. Justice Sutherland's admonition over forty years ago is appropriate: "[The] interest [of the United States] in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). And justice mandates, particularly when none of the justifications for grand jury secrecy are viable, that disclosure here be allowed.

II

In its brief in this court, the Government admits that there was "no testimony and no evidence that any campaign funds were diverted to Clavey's use." Yet it argues that the giving of the campaign contribution instruction was harmless error. The majority agrees with the Government and cites *United States v. Demopoulos*, 506 F.2d 1171 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975), and *Long v. United States*, 360 F.2d 829 (D.C. Cir. 1966), in support of its holding. These cases are distinguishable. In *Demopoulos*, no objection was made to a clause in a sentence inadvertently included in the instruction. In *Long*, the Court of Appeals for the District of Columbia commented: "The charge was inappropriate and apparently inadvertent . . . . In the circumstances this was harmless error; we note that no objection was made on this score at the time." *Id.* at 835. In contrast, the giving of the instruction here was not inadvertent—the defendant timely objected on the specific ground that there was no evidence that he had diverted campaign funds to his own use. The trial judge, in overruling the objection, said: "From all the facts and circumstances in the case, in the evidence produced, it is a fair inference to draw. That is up to this jury, not to me." Significantly, Government counsel kept silent.

This case comes directly within the Supreme Court's holding in *United States v. Breitling*, 61 U.S. (20 How.) 252 (1857). There Mr. Chief Justice Taney wrote:

> It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; *and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.* 61 U.S. at 255 (emphasis added).

The Ninth Circuit in *Morris v. United States*, 326 F.2d 192 (9th Cir. 1963), after analyzing the evidence, concluded that there was no evidence or reasonable inference to base a challenged instruction and, citing *Breitling*, reversed the conviction. In the case before us there is no need to analyze the evidence. It is admitted that there was no testimony that any campaign funds were ever diverted to the defendant's personal use. Nonetheless, the majority argues that *because* there was no evidence on that score, "the jury could not have convicted Clavey on the basis of the campaign fund instruction." With deference, I suggest this is a sophism. If there were evidence to support the instruction, it would not have been error to have given it. But there was no evidence; hence, there was no reason to give it. The argument of the majority would allow the instruction

willy-nilly, whether or not there was any supporting evidence. Such a view flies in the face of the reasons stated in *Breitling* for reversing a judgment because of a jury instruction which has no evidentiary basis.

III

After the jury returned its verdict and had been discharged, the trial judge made the following announcement from the bench:

> The Court: There were two questions asked of the court last night. At a little after 5:00 o'clock the first question was asked—sent to me by a note from the foreman of the jury to my Deputy United States Marshal James Guidagno—and I have it here in the original handwriting, signed by Mr. Sawyer, the foreman, who was the gentleman that sat here—the question:
>
> "Is it possible to have copies of the instructions to the jury?"
>
> The answer of the court was No. I have never let instructions go to the jury because I believe, and always did, and many of the judges agree with me—some of them don't—I believe it confuses them more than it aids and assists them.
>
> The next question:
>
> "Is it possible to have the judge explain a couple of points about the indictment and counts?"
>
> And the answer to that was No, because I will not become a thirteenth juror in this case, and I should not invade the province of the jury, which I did not do. The answer to the question of the jury, carried to them by the deputy United States marshal, was to continue to deliberate.
>
> This morning at about 9:25 another note was addressed to the court. It says:

> "The counts in the indictment are related to one another, some more than others. For example, count 2 is related to count 5. In this respect, if we find the defendant guilty on count 2 and/or count 3, must we also find him guilty on count 1?"
>
> And the court's answer to that question was to continue to deliberate, and then minutes later they came out with a verdict.

The majority acknowledges that the judge erred in not informing counsel of the jury's communications and in not responding to the questions. Unfortunately the majority holds these errors to be harmless. But they were not harmless.

The Supreme Court in *Rogers v. United States*, 422 U.S. 35 (1975), reiterated the requirement laid down in *Shields v. United States*, 273 U.S. 583 (1927), that counsel be informed of inquiries from the jury such as were made here and be given an opportunity to be heard before the judge responds. In *Rogers*, Mr. Chief Justice Burger wrote:

> As in *Shields*, the communication from the jury in this case was tantamount to a request for further instructions. However, we need not look solely to our prior decisions for guidance as to the appropriate procedure in such a situation. Federal Rule Crim. Proc. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded. 422 U.S. at 39.

It is true that the Chief Justice also commented that a violation of Fed. R. Crim. P. 43 may be harmless error in some situations, citing Fed. R. Crim. P. 52(a). However, Rule 52(a) provides that, "[a]ny error, defect, irregularity or variance which does not affect substan-

tial rights shall be disregarded." How can it be said that the substantial rights of the defendant here were not affected by the judge's not informing counsel of the jury's communications to him and by his not responding to their inquiries?

The majority strains to construct an apology for the judge's error, but at best its hindsight effort is speculation and at worst a sophism. For example, the majority speculates that the last two questions asked by the jury "appear" to be related, and that when read together the final question "appears" to be only a specific version of the one asked the night before. The majority then hypothesizes that because the defendant was acquitted on certain (but not all) counts to which the last question related, the judge's answer, if given, could not have "produced a more favorable result for him." The majority apparently rules out the possibility of a complete acquittal had the judge taken the steps the majority says he should have taken.

Finally, the majority acknowledges that Government witness March's financial condition was relevant rebuttal evidence, yet says that the trial judge did not abuse his discretion in refusing its admission. The majority also concedes that the judge should have given the defendant's motive instruction as proffered, but explains the error away by saying the jury could have interpreted other instructions as supplying the essential missing language.

The doctrine of harmless error does indeed have a place in the review of criminal trials; however, it should not be used to excuse the glaring trial errors that permeate this case. The Supreme Court in *Chapman v. California*, 386 U.S. 18, 22, 24 (1967), defined harmless error in constitutional terms:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not resulting in the automatic reversal of the conviction.
>
> * * *
>
> [W]e hold . . . that before a federal constitutional error can be held harmless, *the court must be able to declare a belief that it was harmless beyond a reasonable doubt.* (emphasis added)

I believe that errors not of constitutional dimension should also be judged by the same standard. When the errors here are so judged, it is clear that they were far from harmless.

Mr. Justice Clark, while sitting by designation in the Seventh Circuit, once had occasion to comment: "'Harmless Error' is swarming around the 7th Circuit like bees." *United States v. Jackson*, 429 F.2d 1368, 1373 (7th Cir. 1970). Regretful as the situation was that prompted Mr. Justice Clark's remark, it is even more regretful that "harmless error" has been used in this case to deny the defendant the new trial to which he is entitled.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

(Order of February 28, 1978,
Granting Rehearing En Banc)

United States Court of Appeals
For the Seventh Circuit

February 28, 19 78

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
PHILIP W. TONE, Circuit Judge
WILLIAM J. BAUER, Circuit Judge
HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 76-1926 vs.

ORVILLE S. CLAVEY,
Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing En Banc

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Orville S. Clavey, a majority of the active members of the Court have voted to grant a rehearing *en banc* on the issue of disclosure of the grand jury testimony. Accordingly,

IT IS ORDERED that this case be scheduled for oral argument on Friday, April 14, 1978 at 2:00 p.m. in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 2721, Chicago, Illinois. Oral argument shall be limited to twenty (20) minutes per side.

APPENDIX C

(Opinion of June 23, 1978)

United States Court of Appeals
For the Seventh Circuit

CORRECTED

No. 76-1926

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ORVILLE S. CLAVEY,

Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing *En Banc*

JUNE 23, 1978

Before FAIRCHILD, *Chief Judge*, SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER, and WOOD, *Circuit Judges.*

PER CURIAM. A petition for rehearing en banc in the above-entitled cause on the issue of disclosure of the grand jury testimony was granted on February 28, 1978, thereby vacating the decision of the original panel on this issue. *United States v. Clavey*, 565 F.2d 111 (7th Cir. 1977).

After rehearing en banc, Judges Fairchild, Swygert, Pell and Sprecher voted to reverse; Judges Cummings, Tone, Bauer and Wood voted to affirm. The court being equally divided on the question, the order of the district court on this issue is affirmed without opinion.

As to all other issues, petition for rehearing en banc was denied, and no rehearing en banc was held. Therefore, in all other respects, the opinion of the panel remains unchanged.

SWYGERT, *Circuit Judge.* The court affirms the rulings of the district court by an equally divided vote and therefore without an opinion. I feel compelled, however, to file a separate statement because of an entirely new argument made at the last minute by Government counsel. The *en banc* hearing was granted only on the grand jury issue, and briefs by both parties were addressed prior to the argument on rehearing to that issue as framed by the majority of the original panel and the dissent. *See United States v. Clavey,* 565 F.2d 111 (7th Cir. 1977). The Government, however, chose to orally argue a position which it never before briefed or argued to either the district court or this court.

The Government now argues that even if the defendant was entitled to inspect a copy of his own grand jury testimony, the error in denying him that right was harmless because the defense of recantation was not available to him. For support the Government cites 18 U.S.C. § 1623(d) which provides that the recantation defense is available only "if it has not become manifest that such falsity has been or will be exposed." The Government now argues that it was so "manifest" and that therefore the recantation defense was not available to Clavey.

Until the argument on rehearing, the Government consistently maintained that Clavey was not entitled to inspect a copy of his grand jury testimony because he failed to demonstrate a particularized need. It was not until the *en banc* hearing that the Government argued that the defense was not even available.[1] If this issue is

[1] The Government did "raise" the issue before Chief Judge Robson. On December 6, 1974 the Government ended its reply to Clavey's first petition by stating:

> Finally, the Government states that Section 1623(d) is not directed at explaining testimony, but instead concerns the actions which a witness may take if he admits his

(Footnote continued on following page)

so dispositive and crucial as the Government now contends, I cannot understand why it was not argued before the district judge in the first instance or, in any event, before the original panel. Only at the eleventh hour did Government counsel advance its new position without the benefit of briefs and only on short notice to defense counsel. Regardless of the unfortunate posture of this issue at the rehearing argument, I have given the issue great deliberation. And, because I am convinced that the Government's new position is without merit, I believe I should state my reasons.

A

At argument the Government contended that the phrase "has not become manifest that such falsity has been or will be exposed," means that the falsity must be

[1] *continued*

> testimony is false and then before the false declaration has substantially affected the Grand Jury proceeding or before it has become manifest that the falsity has been or will be exposed. Although petitioner has not yet admitted the falsity of his testimony, the Government states that petitioner's testimony was false, has substantially affected the Grand Jury proceedings, and that its falsity has been exposed to the Government and the Grand Jury.

On December 13, 1974 the Government stated at the end of a seven page reply to Clavey's second petition:

> [Fourth], the Government reasserts that the falsity of petitioner's testimony has substantially affected the grand jury proceedings and that its falsity has been exposed to the Government and the grand jury.

Several comments are in order. The Government never alleged that it was manifest to Clavey that "the falsity had been or will be exposed," nor did it argue or even mention this issue in either of the two hearings before Judge Robson. In any event, Judge Robson could not have ruled in the Government's favor on this issue as it offered no factual support for its assertions. Finally, the Government's actions before the district court were utterly inconsistent with its present position. At the first hearing before Judge Robson, the United States Attorney's office assured the court and Clavey's attorney that the grand jury would be in session for some time, thereby implying that Clavey could return to the grand jury to recant.

exposed to the grand jury.[2] Even if the phrase is so interpreted, the Government cannot succeed as the facts will demonstrate.

At trial it was shown that Gene March, a private investigator, performed ten lie detector tests in 1972 for the Lake County Sheriff's Office. March was to receive $1,000 for this job. Prior to this performance, however, March and defendant Clavey, then Sheriff of Lake County, Illinois, agreed that March would kickback $200 to Clavey and $200 to Clavey's assistant, Jerome Schuetz. When March submitted his bill in 1973, he gave Clavey a check for $400 in exchange for a check in the amount of $1,000. On the face of the $400 check appeared the notation, "RT Loan." Clavey's defense at trial was that the $400 constituted repayment of a loan.

Prior to his indictment, Clavey appeared before the grand jury on September 18, 1974. Although Clavey denied that he ever received a kickback from March, he did say that he once loaned money to March. When asked about the amount, Clavey replied, "Oh, just a few dollars."

Clavey first retained his attorney on Sunday, November 24, 1974. The next day the attorney wrote the United States Attorney in which he made certain comments, summarized as follows:

> —that the letter be considered as a "formal request" for a copy of a transcript of Clavey's grand jury testimony,
> —that the purpose of his request was to advise Clavey on whether to recant pursuant to 18 U.S.C. § 1623,
> —that the transcript be furnished before the grand jury was discharged, and
> —that the transcript will be accepted under any "restrictions as may be required to preserve the secrecy of the Grand Jury."

[2] At the hearing the Government asserted that the phrase means manifest to the Government. During the course of the argument, however, the Government appeared to retreat from this interpretation and rely primarily on the grand jury construction. Clearly the phrase cannot mean manifest to the Government. If it were so interpreted, a successful recantation defense would almost never be available.

On December 4, 1974 March appeared before the same grand jury and read a prepared written statement.[3] At this appearance March's testimony about his employment by the sheriff's office and the kickback arrangement was substantially the same as that which he later gave at trial. In addition, March's prepared text included the following:

> I met with Clavey alone in his office [on the afternoon of September 18, 1974]. At that time, Clavey asked me how I was and if I had been subpoenaed yet. I said I had not. This was not true. I then asked what he wanted to talk to me about. Clavey said, "Gene, that damn Schuetz told them downtown about that $400 cash that you gave us and about wiretapping." I said that I didn't know what he was talking about and that I did not know anything about wiretapping.

Also on December 4, 1974 an assistant United States attorney responded to defense counsel's letter of November 25. In this letter the Government counsel stated that if a copy of Clavey's grand jury testimony was desired, "an appropriate motion [would have to be made] before Judge Edwin A. Robson requesting a disclosure order under Rule 6(e)." Defendant's attorney filed such a petition on December 5, the following day.

From this review of the record it is clear that the falsity of Clavey's testimony could not have become manifest to the grand jury until December 4, 1974, the day March testified. With that indisputable fact in mind, it is equally clear that prior to December 4, specifically on November 25, Clavey by means of his attorney's letter requested an inspection of his grand jury testimony to determine if he should recant. Thus Clavey's intention was made known before the falsity of his testimony could have become manifest to the grand jury.

The Government argues that Clavey's intention did not become legally effective until December 5, when Clavey filed his first petition for disclosure. In support of its

[3] A copy of the grand jury transcript containing this statement was not filed in this court by the Government until the morning of April 14, 1978, the day of the *en banc* hearing.

position the Government cites Rule 6(e) of the Federal Rules of Criminal Procedure.[4] This argument is, I submit, based on a technicality and does not take into consideration both the realities and the requirement of fairness.

In the letter written by his attorney on November 25, Clavey sought his grand jury testimony to determine whether there was anything in it to recant. Rather than responding immediately, Government counsel waited until December 4 to reply—the very day March appeared before the grand jury. It is evident that defense counsel's letter of November 25 had the effect of "tipping off" the Government. By waiting to respond until March's appearance, the Government sought to foreclose Clavey's chance of exercising a statutory defense. This tactic can be interpreted only as deliberate unfair treatment of Clavey.

The unfairness does not stop here. It is incongruous that at the hearing before Judge Robson on December 6, 1974, the Government did not argue (as it does now) that the recantation defense was no longer available to Clavey. Had this issue been presented, Judge Robson would undoubtedly have treated it and, if he had agreed, he would not have had to reach the question whether a particularized need was shown. Instead of pressing this point Government counsel assured Clavey's attorney and the court that the grand jury would be in session for some time—implying that the opportunity to recant was still available.

[4] Rule 6(e) provides in part:

> Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

In my opinion the record is clear that at the time Clavey made his original request for his grand jury transcript it was not manifest to the grand jury that Clavey's testimony was false. Hence, the Government has failed to establish that the recantation defense was not available.

B

Arguably 18 U.S.C. § 1623(d) means that it must be manifest to the grand jury witness that his falsity will be exposed, rather than manifest to the grand jury. Although this would appear to be the better view,[5]

[5] Several reasons support the view that the better interpretation is that it must be manifest to the witness, not to the grand jury. *See United States v. Swainson*, 548 F.2d 657, 663 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977). First is the language of the statute itself. The key words are that "it has not become manifest that such falsity *has been* . . . exposed." (Emphasis added.) If a prosecution witness testifies before a putative defendant (who perjures himself), recantation is never available for as soon as the putative defendant testifies, the falsity "has been exposed" to the grand jury. Clearly it could not have been the intent of Congress to let the availability of the recantation defense depend on the order in which the prosecution brings in the witnesses.

Policy reasons and logic also support the construction that it must be manifest to the witness rather than the grand jury. The purpose of the recantation defense is to induce grand jury witnesses to give truthful testimony. *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir. 1976). This policy is furthered if witnesses are allowed to correct previously made false statements without incurring the risk of prosecution by doing so. But to discourage witnesses testifying falsely and then recanting as soon as they learn that the grand jury has learned or will learn of their deceit, the statute permits the defense only when witnesses do not know that the grand jury has been or will be exposed to their perjury. Thus the provision balances two competing interests.

Finally, support is found in the legislative history. The House Report to Title IV of the Organized Crime Control Act of 1970 states that the recantation provision is modeled after New York Penal Law § 210.25. [1970] U.S. Code & Ad. News at 4023-24. Although the New York law on its face is as vague as the federal provision, its legislative history indicates that the statute codifies case law. Case law in New York is clear that it is the witness, not the grand jury, to whom the falsity must be manifest. *See People v. Ezangi*, 2 N.Y.2d 439, 161 N.Y.S.2d 75, 78, 141 N.E.2d 580, 583 (1957).

Clavey's recantation defense was available even under this interpretation.

The Government argued that the falsity of Clavey's grand jury testimony was manifest to Clavey just hours after he testified. Sole support is found in one sentence of March's grand jury statement wherein Clavey purported to have said: "Gene, that damn Schuetz told them downtown about that $400 cash that you gave us and about wiretapping."

The problem with this argument is that the district court has never determined when, if ever, the falsity became manifest to Clavey. It was not resolved by Judge Robson, and was not raised before the original panel. That Clavey was convicted on the count of false swearing merely means that the jury believed Clavey was lying to the grand jury. The conviction does not mean that on the afternoon of September 18 it was manifest to Clavey that the falsity of his testimony "has been or will be exposed" to the grand jury.

Even if we were to substitute March's one sentence from his prepared text for a hearing in which Clavey could have a chance to respond (a chance he has yet to have) and for a judicial determination, I still believe the Government has not met its burden of showing that a recantation defense was unavailable. Whom did Schuetz talk to "downtown"? Someone at the United States Attorney's office? The grand jury? Did Schuetz in fact appear before the grand jury or talk to someone at the United States Attorney's office before September 18? We simply do not know; the record is barren.

In summary, I am convinced that no matter how the crucial clause appearing in section 1623(d) is interpreted, the Government should fail in its contention that the recantation defense was not available and that for the reasons set forth in my dissent in the original panel decision, the defendant should have been allowed to inspect his grand jury testimony.

Finally, it is with great reluctance that I speak about the Government's delay until oral argument at the *en banc* hearing to present its new position. Twice before the district court and twice before this court (before the original panel and in response to the petition for re-

hearing),[6] the Government did not argue its present position. Only on the day prior to the argument to the *en banc* court did the Government seek to supplement the record with materials which were available for more than three years in order to lay the evidentiary basis for its new argument. Significantly, this material was not before Judge Robson. Significantly also, the copies of this supplemental record did not reach members of this court prior to argument. Only during the rehearing argument did the Goverment set forth its new challenge to defendant's attempt to assert a recantation defense.

PELL, *Circuit Judge.* I agree with the statement of Judge Swygert and join therein. I add, however, that I cannot conceive that the phrase in 18 U.S.C. § 1623(d), "has not become manifest" can refer to any situation other than manifestness to the witness who desires to recant.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] The Government also had an opportunity to raise the argument when Clavey sought to suppress his grand jury testimony in the spring of 1975. It did not do so; its argument again was limited to Clavey's purported failure to show a particularized need.